NO. 82-2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LICENSED BEVERAGE DISTRIBUTORS ASSOCIATION,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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LIST OF PARTIES

Petitioner:

Licensed Beverage Distributors Association, whose members are:

Accent Wine & Spirits
American Wine
Block Distributing Company
Glazer Wholesale Drug
Golman Wholesale Liquor Co., Inc.
Key Distributors, Inc.
Lone Star Company
Longhorn Liquors, Ltd.
McKesson Wine & Spirits
Quality Beverage Company
Schepps Wholesale Liquors
Tarrant Distributors
Terk Distributing Company
White Rose

Respondent:

United States of America in behalf of the Department of the Navy, Consolidated Package Store, Beeville Naval Air Station and other nonappropriated fund instrumentalities.

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

STATUTES

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The following reply to the Brief in Opposition[1] is respectfully submitted under the authority of Rule 22.5 of the Rules of this Court.

RESPONDENT'S BRIEF NARROWS THE ISSUES BUT ESTABLISHES ADDITIONAL REASONS FOR GRANTING THE WRIT.

Both in stating the facts (Brief, 2-4) and in presenting argument (Brief, 7-8), Respondent recognizes that the only control which the State of Texas has ever exercised has been over its own permittees—nonresident sellers and

1. The brief responds to the petition of the State of Texas, et al., Cause No. 82-2013, as well as to that presented by this Petitioner. Since both petitions relate to the same decision, they are appropriately subject to joint consideration. For that purpose this Petitioner adopts the arguments made in the reply brief being submitted by the Petitioners in Cause No. 82-2013.

wholesalers. Texas has not assumed to require the non-appropriated fund instrumentalities (NFIs) to secure permits and has never asserted a claim against any one of them. The NFIs can and do purchase alcoholic beverages from Texas wholesalers.[2]

Respondent concedes that the legal incidence of the Texas gallonage tax is on the wholesalers—not on the federal government and, therefore, that "the Texas gallonage tax is not an unconstitutional tax on federal instrumentalities" (Brief, 8). The admitted purpose of the suit was to enable the NFIs to circumvent the Texas wholesalers and thereby avoid the incidental effect of the gallonage tax (Brief, 3-4). Respondent's contention is that in enforcing state law, Texas is "precluding the NFIs from purchasing alcoholic beverages from any [out-of-state] suppliers" in violation of the Supremacy Clause (Brief, 8). In other words, Respondent's position is that the Supremacy Clause confers immunity from state law on those who would sell alcoholic beverages to NFIs. Respondent assumes to interpret the opinion of the Court of Appeals as so holding (Brief, 8).[3]

AS INTERPRETED BY RESPONDENT, THE OPINION BELOW CONFLICTS AT LEAST IN PRINCIPLE WITH *WASHINGTON V. UNITED STATES*, ____U.S.____, 103 S.CT. 1344 (1983).

The cited case, like the case at bar, was instituted by the United States as a suit for declaratory judgment and

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2. Those facts were established (III-R. 51, 87, 129-130, 155), and Respondent does not assert anything to the contrary.

3. Petitioner continues to believe that the opinion below was properly analyzed in its petition and, therefore, accepts Respondent's interpretation only for the limited purpose of showing that even as defensively interpreted, the opinion is in conflict with and contrary in principle to this Court's decisions.

injunctive relief. In Washington, the United States sought to provide third parties, contractors who worked for the federal government, with immunity from a state sales tax. In Texas the United States sought to provide other third parties, nonresident sellers who might sell to NFIs, with immunity from regulation under the Texas Alcoholic Beverage Code. In both instances relief was sought under the Supremacy Caluse.

The contractor in the Washington situation was identified by this Court as "a vendor of services to the United States" (103 S.Ct. 1350). A nonresident seller from whom NFIs would purchase in the Texas situation would be "a vendor of alcoholic beverages to the United States." It is, of course, true that the Washington case involved a tax the legal incidence of which did not fall on the federal government, but as this Court noted (103 S.Ct. 1349), the economic burden of the tax was or could be passed on to the federal government. The obvious objective of the suit seeking tax immunity for the contractor was to lower the price which the government would have to pay for the contractor's services. In the case at bar immunity from state regulation—rather than taxation—has been sought for nonresident sellers of alcoholic beverages, but in view of the admitted fact that NFIs want to purchase directly from nonresident sellers in order to avoid any pass through of the Texas gallonage tax, the objectives of the two suits are not really distinguishable. After discussing a comparable difference urged by the government in the *Washington* case, this Court commented, "To rest upon this distinction would be to elevate form over substance" (103 S.Ct. 1350). The prior judgment for the government was reversed by the holding that (103 S.Ct. 1350):

> "In short, Washington has not singled out contractors who work for the United States for discriminatory treatment. It has merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner. This the State may do without running afoul of the Supremacy Clause."

The reason for reversal in the case at bar is even more compelling. Washington had only a short time earlier drafted the provision there in question with the specific purpose of placing the legal incidence of the tax on the contractor rather than on the federal government. The suit was instituted shortly thereafter (103 S.Ct. 1347). Texas has imposed permit requirements on and regulated nonresident sellers for more than forty years (Acts 1943, 48th Leg., ch. 325, p. 509), and the gallonage tax on liquor has been levied against Texas wholesalers since the repeal of prohibition (Acts 1935, 44th Leg., 2nd C.S., ch. 467, p. 1795). Acceptance of Respondent's interpretation of the opinion below results in that opinion's being in conflict with the basic principles followed by this Court in its recent decision in *Washington v. United States* and provides an additional and compelling reason for granting the writ.

THE THEORY OF SUPREMACY CLAUSE PROTECTION FOR ALL PROCUREMENT ACTIVITIES IS UNSUPPORTED BY AUTHORITY AND IN CONFLICT WITH THE PRINCIPLES FOLLOWED BY THIS COURT IN THE VERY DECISIONS ON WHICH RELIANCE HAS BEEN PLACED.

Respondent's basic position is that procurement activities constitute a particular category immune from state regulation. The *Washington* case discussed above refutes that contention, but Respondent assumes to interpret

Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1963), and *Paul v. United States*, 371 U.S. 245 (1963), as establishing that procurement activities of military installations have an absolute immunity from state control. In neither instance, however, did this Court base its decision on that ground.

In *Leslie Miller, Inc.*, a contractor employed by the government to construct an air force base in Arkansas had been convicted for working as a contractor without a state-issued license. This Court quoted both the federal requirements for a contractor and the state licensing provisions and pointed out that the "mere enumeration" was "sufficient to indicate conflict . . . [which] would thus frustrate the expressed federal policy" (352 U.S. 189-190). In other words, that was a classic case of conflict under the Supremacy Clause. Arkansas could not prohibit the federal government from selecting its own employee.[4]

Direct conflict was also the basis of decision in *Paul*. California's minimum price law for milk was absolutely contrary to the federal requirement for competitive bidding. In this Court's words, federal policy "demands competition" while the California policy "effectively eliminates competition" (371 U.S. 253).[5] Even more significant to the case at bar is the fact that in *Paul* this Court distinguished and reaffirmed its decision in *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943),

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4. Texas has never regulated employment practices, and no state law has been shown to conflict with the regulation relied upon by the NFIs.

5. There is no "demand" for competition in the regulation urged by the NFIs; Texas does not fix prices; and the evidence before the Court established that other than by attempting to purchase from out-of-state suppliers to avoid the Texas gallonage tax, NFIs made no effort to secure the lowest price available (III-R. 24, 26-28, 32, 129).

which had been decided under an earlier federal regulation reconcilable with state law.[6] *Penn Dairies* involved a purchase by the Army; the decision has not been overruled but instead was cited in *Hancock v. Train*, 426 U.S. 167 (1976), as authority for the proposition that the Supremacy Clause does not bar all state regulation which may touch the activities of the federal government (426 U.S. 179). Clearly *Penn Dairies* is contrary to Respondent's contention that the Supremacy Clause frees all military procurement from state regulation.[7]

On the general proposition of preemption by federal regulation, Respondent cites *Fidelity Federal Savings and Loan Association v. de la Cuesta*, ____U.S.____, 102 S.Ct. 3014 (1982), but because of the marked contrast between the regulation there involved and the one relied upon by NFIs here, the decision provides no support for Respondent's position. As this Court pointed out, the savings and loan board in its preamble to the regulation "explained its intent that the due-on-sale practices of federal savings and loan be governed 'exclusively by Federal law' " (102 S.Ct. 3019). On the basis of that language it was concluded "that the Board's due-on-sale regulation was meant to preempt conflicting state limitations on due-on-sale practices" (102 S.Ct. 3025). Particular emphasis is placed throughout on the use of the word "exclusively." The regulation relied upon by NFIs is titled "Cooperation" and opens with the directive that "DOD will cooperate

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6. The regulation relied upon by the NFIs is comparable with that in *Penn Dairies*, which is discussed by Petitioners in No. 82-2013 (see particularly No. 82-2013, Pet. 24, 29-30).

7. The same is true of *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), which was based on sales to military bases and which was cited with approval and distinguished in *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975).

with all duly constituted regulatory officials (local, State and Federal)" (Pet. 3).

Much closer in point is *Rice v. Rehner*, ____U.S.____, 103 S.Ct. 3291 (1983), where this Court refused to find preemption by either federal or tribal law and held that California could require a federally licensed Indian trader to secure a state license for retail sale of distilled spirits on an Indian reservation. The final ruling was that the application of state law does "not interfere with federal policies concerning reservations" (103 S.Ct. 3303).

RESPONDENT HAS IN EFFECT CONCEDED THE MERIT OF THE REASONS INITIALLY URGED FOR GRANTING THE WRIT.

To avoid admitting conflict with *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), Respondent characterized that case as involving only the tax immunity doctrine and conceded that Texas can constitutionally collect the gallonage tax with respect to purchases made by NFIs (Brief, 8). Respondent must have agreed also with this Petitioner's construction of *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975), as a tax case holding the tax to be unconstitutional because the legal incidence fell on federal instrumentalities. Respondent cites the case as showing "federal government immune from taxation" (Brief, 7).

The decision below, however, was clearly based on the Mississippi situation (Pet. App. A11-A14). Respondent does not dispute the extensive discussion of the facts and holdings in the cases but has attempted to provide explanation by asserting that under the heading, "Exclusive Zone of Federal Jurisdiction," the court below was "re-

ferring to subject matters of exclusive federal concern (such as federal military procurement) and not to matters of geography" (Brief, 5-6, ftn. 6). The court below used no language to indicate such a concept, and Respondent has not even attempted an explanation for the asserted "exclusive federal concern" that military employees be able to purchase alcoholic beverages at lower prices than other citizens.[8]

Moreover, the opinion itself refutes the interpretation which Respondent purports to place upon it. Under the heading EXCLUSIVE ZONE OF FEDERAL JURISDICTION, the initial paragraphs explain and limit an earlier decision of the court.[9] The remainder of the opinion is devoted entirely to discussion of federal enclaves and to decisions involving concurrent or exclusive jurisdiction over federal enclaves.[10] The constitutional provision authorizing federal enclaves, Article I, Section 8, Clause 17, is cited and quoted in its entirety (Pet. App. A11, ftn. 8).[11]

Military procurement—the topic which Respondent asserts the court below was treating—is not even mentioned

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8. This Court refused to apply the Supremacy Clause to grant a comparable preferential treatment to employees of the Forest Service, *United States v. County of Fresno*, 429 U.S. 452 (1977), and in *Washington v. United States*, discussed above, held that the Supremacy Clause prevents only discrimination against federal employees. "The state does not discriminate against the Federal Government unless it treats someone else better than it treats them" (103 S.Ct. 1350).

9. *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert. granted, 446 U.S. 949, j'ment vacated and remanded, 626 F.2d 1200 (5th Cir. 1980) (Pet. App. A8-A10).

10. The terms "federal enclave" or "enclave" with obviously the same intended meaning, are used, in either the singular or the plural, a total of seven times (Pet. App. A10-A14).

11. The court below did not even refer to the war powers listed in Article I, Section 8 cited and quoted by Respondent (Brief, 5, ftn.5).

except in connection with the Mississippi cases where it had been established that either "concurrent" or "exclusive" federal jurisdiction existed over military "enclaves." Respondent asserts, however, that the Court of Appeals "specifically stated" that its decision was "unaffected" by the concepts of "concurrent" or "exclusive" federal jurisdiction[12] and that the court "discussed geography in the context of rejecting Petitioners' claim that the grant of authority in the Twenty-first Amendment . . . includes authority to regulate liquor distribution to a federal enclave" (Brief, 5-6, ftn. 6).

The explanation is necessarily futile because even if accepted it establishes that the court below decided an issue by assuming facts for which there is no record support. As Petitioner has previously pointed out (Pet. 9-10), there is no evidence of either "concurrent" or "exclusive" jurisdiction over any base in Texas. The court below may have presumed that either one or the other

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12. Petitioner does not agree. The words of the court at the cited point are (Pet. App. A11, ftn.8):

> "The record reveals some doubt as to whether the military installations here are subject to concurrent or exclusive jurisdiction. Because of the Supreme Court's decisions in *Tax Commission, supra,* and *Tax Commission (II)*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975), we believe the present issues are unaffected by such distinctions since there is no contention that the state has reserved the right to regulate alcoholic beverages on those enclaves subject to concurrent jurisdiction."

That statement in no way contradicts but is instead entirely consistent with the earlier declaration that (Pet. App. A4, ftn.1):

> "Because our analysis turns on the proposition that the state may not, in any manner, regulate the distribution or consumption of alcoholic beverages on a federal enclave in the absence of an agreement between it and the federal government, we find no need to pass on the validity of these arguments [arguments with regard to the legal incidence of the Texas gallonage tax]."

Both of the above statements clearly refer to the Mississippi tax cases which Respondent has, in effect, conceded could not properly have been followed in the case at bar.

necessarily exists, but in *Paul v. United States*, a decision specifically urged by Respondent, this Court expressly held that the federal government's possession can be "simply that of an ordinary proprietor" (371 U.S. 245, 264).

The entire federal enclave concept was originated by the Court of Appeals. Respondent never attempted to establish federal jurisdiction, and Petitioners never claimed any right with regard to a federal enclave. Respondent urged the Supremacy Clause as conferring immunity from state regulation on nonresident sellers who might sell to NFIs. Petitioners relied upon the Twenty-first Amendment as granting to the state the right to regulate those suppliers of liquor for importation into Texas who might qualify to do so by securing nonresident seller's permits.

The brief in opposition provides no basis for denial of writ but instead augments and emphasizes the reasons for granting writ.

For the reasons originally set forth as well as those presented in this reply, Petitioner Licensed Beverage Distributors Association prays that its petition for writ of certiorari be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Reply to Brief of the United States in Opposition on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to:

Mr. Rex. E. Lee, Solicitor General
Mr. Glenn L. Archer, Jr.,
Assistant Attorney General
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MARY JOE CARROLL